U.S. Department of Justice

United States Attorney
Eastern District of New York

BWB:MKP
F. # 2015R00506

271 Cadman Plaza East
Brooklyn, New York 11201

October 19, 2015

By Hand and ECF

The Honorable Carol Bagley Amon
Chief United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Jaroslaw Pogoda
Criminal Case No. 15-170 (CBA)

Dear Chief Judge Amon:

The government writes in connection with the defendant's sentencing scheduled on October 20, 2015 and in response to the defendant's sentencing letter dated October 15, 2015 requesting that the Court sentence the defendant to five years' incarceration, the mandatory minimum under 18 U.S.C. §§ 2252(a)(2), (b)(1). The statutory maximum term of imprisonment on each count is 20 years. PSR at ¶ 79. The Guidelines imprisonment range is 151 to 188 months based upon a total offense level of 34 and a criminal history category of I. PSR at ¶ 80. The government objects to a non-Guidelines sentence as insufficient to accomplish the goals of Section 3553(a) of Title 18 of the United States Code, particularly reflecting the seriousness of this offense, promoting respect for the law, providing just punishment, and general deterrence. Id. As such, the government respectfully requests that the Court sentence the defendant to a term of imprisonment within the Guidelines range of 151 to 188 months.

BACKGROUND

On several dates in February 2015, an agent within the Federal Bureau of Investigation ("FBI") conducting undercover investigations into the Internet distribution and possession of child pornography identified the defendant's computer on a peer-to-peer file sharing network sharing child pornography. The agent downloaded 442 files in their entirety from the defendant, almost all of which depicted children engaged in sexually explicit conduct. These files included images of infants and toddlers being raped and sodomized. Based on this information, a search warrant was executed on March 17, 2015, and the defendant's computer was seized, revealing 1,288 still images and 353 video clips, the majority of which also depicted children as young as infants being raped and sodomized.

On July 2, 2015, the defendant pled guilty to a three-count Indictment charging him with distribution, receipt and possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(2), (a)(4)(B), (b)(1) and (b)(2).

ARGUMENT

I. Factors Under 18 U.S.C. § 3553(a)

This Court must consider all of the sentencing considerations set forth in Section 3553(a). Gall v. United States, 552 U.S. 38, 49-50 (2007). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner; (5) the guidelines and policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

A. Nature and Circumstances of the Offense

In a child pornography case such as this one, the primary victims are the children depicted. United States v. Shutic, 274 F.3d 1123, 1126 (7th Cir. 2001); United States v. Sherman, 268 F.3d 539, 547-48 (7th Cir, 2001). As the Sherman Court noted, "child pornography directly victimizes the children portrayed by violating their right to privacy." Id. As the Court noted in Shutic, "children . . . suffer profound emotional repercussions from a fear of exposure, and the tension of keeping the abuse a secret . . . . concern for the welfare of the children who are used to create pornography is part of the public concern over child pornography." Shutic, 274 F.3d at 1126 (citations omitted).

The fact that the children suffer the sexual abuse in the first place is a horrible reality. By consuming the images of these children's suffering, the defendant continued the exploitation for his own sexual gratification. He also distributed these images making them accessible to more people as he received additional images himself.

Here, the defendant minimizes the significance of his conduct by noting that he "did not make the videos, nor did he profit from them in any way." Def.'s Sentencing

Letter at 4. This argument is unavailing. Had the defendant produced child pornography or financially profited from it, he would likely be facing different charges which carry different mandatory minimums and higher Guidelines ranges. See United States v. Goff, 501 F.3d 250, 258-59 (3d Cir. 2007) (noting that the defendant "was not charged with molestation, so pointing out that he hadn't committed it is, in one sense, irrelevant"). Furthermore, even though he did not produce child pornography, the defendant's consumption of images of child sexual exploitation has many victims. As the Third Circuit, Court of Appeals has stated, "[c]onsumers . . . who 'merely' or 'passively' receive or posess child pornography directly contribute" to the victimization of the children who are exploited in those images. See id.

Here, several victims of the defendant's crimes have spoken of the devastating impact that the dissemination of child pornography has had on their lives. One example is a victim of the "Lighthouse" series who wrote that "[b]etween the ages of 3-11 years old, I was raped, molested, beaten and humiliated. My abuse was photographed, videotaped, and sent all over the Internet . . . . If I didn't perform . . . I was hit and punished." She continued, "I continue to be victimized by these perverted . . . kiddy porn people passing around and distributing pornographic videos and images of me. No child should be put through all that I went through let alone have to live with the knowledge that people continue to watch and take pleasure in my abuse and not be able to do anything to stop it."

Mothers of victims have spoken out as well. A mother of a victim in the "Jessica" series wrote that the horror her daughter faced "will never go away entirely" and that in deciding how long an offender should be punished "we need to remember that the victims in the case have also been punished, but their punishment is a lifelong scar, rather than just a few years." One mother of a victim in the "Jan_Feb" series wrote and that her daughter had been transformed "from a buoyant, cheerful child full of energy and enthusiasm, to an anxious and fretful shadow of her former self" and that her daughter's abuse would not have occurred "without a market to receive and trade those images" and without "the encouragement of those who wanted to acquire the images." A mother in the "Jenny" series wrote that her daughter "will never be able to erase the memories of the abuse, pain, and suffering that she received" and that her daughter is now "serving a life sentence" because "once the pictures were posted on the Internet they cannot be eliminated from others that have them or wherever [they are] posted."

Furthermore, although the defendant claims that his conduct "does not evidence any special depravity," the images he chose to download were of the youngest possible children, subjected to the most extreme forms of violence and sexual abuse.

B. History and Characteristics of the Defendant

As noted above, the government agrees that the Court may consider the circumstances asserted by the defendant as to his background. Here, however, looking at the defendant's characteristics weighs in favor of a within-Guidelines sentence.

First, the defendant's behavior has gone beyond just viewing images on his computer screen. The defendant is clearly sexually attracted to children, and there is evidence that he has inappropriately touched a child on at least one occasion and has become sexually aroused by children he has encountered on others. Specifically, the defendant admitted to law enforcement that he touched his ten-year-old cousin on the thigh and buttocks and that he was sexually aroused by his four-month-old cousin during the baby's baptism when the baby brushed against his groin. PSR ¶ 16. The defendant, who lived across from a school, also admitted to law enforcement that he masturbated from the window while watching schoolchildren as they walked by his house.

Second, the defendant has repeatedly lied about and minimized his behavior even after he was arrested and confronted with the mountains of evidence against him. Indeed, when the defendant initially met with Dr. Kreuger, the first forensic psychiatrist to issue a report in this case, he lied and told the psychiatrist that he occasionally looked at images of teenagers who he thought were of legal age and that he did not have an interest in minors having sex. See Ex. E to Defendant's Sentencing Submission at 10. These lies were in marked contrast to his admissions to the FBI, his admissions to his next psychiatrist, and his admissions during his plea allocution, all of which evidenced sexual interest in children as young as infants. The defendant's current efforts at showing remorse seem to be nothing more than an effort to gain leniency at sentencing.

As to the defendant's argument that his personal characteristics should weigh in favor of a below-Guidelines sentence, none of these claims, even taken together, put this defendant outside the mainstream of child pornography defendants.

The defendant claims that he was sexually abused once by a teenaged cousin and that he felt abandoned when his parents left for America. The defendant's own sexual abuse is no excuse for his further victimization of other children. Additionally, the defendant had a supportive family who worked hard to give him opportunities that many people do not have, including the opportunity to attend college. The success of his siblings, who are all pursuing professional careers, is testament to this fact.

Regarding Pogoda's claim that he is physically slight and will be an at-risk inmate, the government notes that the Bureau of Prisons is very experienced at safeguarding child pornography defendants and that Pogoda's physical condition is certainly not atypical for such defendants. There is nothing about the defendant's appearance, affect or health, which would qualify him for a Guidelines departure. As stated in U.S.S.G. § 5H1.4, such a departure is warranted only where a defendant's physical condition or appearance "is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." Id. As noted by the Fourth Circuit, "[e]xcept under truly extraordinary circumstances, prisons exist for those who commit crimes, not just for tough criminals." United States v. Maddox, 48 F.3d 791, 798 (4th Cir. 1995).

C. The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense

As noted above, the consumption of the images of the rape of young children is not a victimless crime. Adequate punishment, respect for the law and just punishment all call for a serious sentence of imprisonment. See 18 U.S.C. § 3553(a)(2). The sentence requested by the defendant sends the message that collectors of such extreme child pornography can expect lenient treatment at the expense of children.

The defendant's reliance on United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010) is misplaced. In Dorvee, application of the Sentencing Guidelines resulted in a Guidelines range that at its lowest was higher than the statutory maximum. That is not the case here, where the bottom of the Guidelines range is nearly seven-and-a-half years below the statutory maximum. A mandatory minimum sentence in this case would disregard the Sentencing Commission's concerns regarding just this type of extreme case where there are a staggering numbers of images depicting the youngest of victims being subjected to horrific acts of violence.

D. The Need to Afford Adequate Deterrence to Criminal Conduct, and to Protect the Public from Further Crimes of the Defendant

The sentence here must give notice that child pornography crimes have serious consequences. The Sentencing Guidelines serve that function in this area. A sentence must convey this message to provide general deterrence. The defendant victimized children by trading images of the rape of these children. A below-Guidelines sentence sends the wrong message to Pogoda and, just as importantly, to other offenders.

CONCLUSION

The seriousness of the underlying offense is evident on its face and calls for a significant prison sentence nevertheless. See 18 U.S.C. § 3553(a)(1). Adequate punishment, deterrence and, most importantly, protection of children all call for a within-Guidelines sentence.

Respectfully submitted,

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